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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

COMPUTER RESERVATIONS SYSTEM (CRS) REGULATIONS; STATEMENTS OF GENERAL POLICY **Notice of Proposed Rulemaking**	**Docket OST-97-2881 -329** **Docket OST-97-3014 -92** **Docket OST-98-4775 -137** **Docket OST-99-5888 - 30**

ANSWER OF ORBITZ, L.L.C.
IN OPPOSITION TO PETITION FOR FACT HEARING

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Sabre has petitioned for a "fact hearing" in the captioned rulemaking proceeding. Sabre argues that unless its petition is granted, "five years of preparation will have been wasted" – although Sabre, itself, did not perceive a need for a hearing until Christmas Eve of the fifth year. Sabre argues that it is "not seeking a full-scale evidentiary hearing" and that the hearing "need not delay these proceedings" – although Sabre wants the ability to cross examine not only representatives of every person submitting comments in the captioned dockets but also at least one "senior Department official" and other "persons identified by the Department as knowledgeable about the facts in the NPRM."

Orbitz, L.L.C. ("Orbitz") opposes the petition, for reasons perhaps as obvious as they are well grounded. There are no material facts that cannot be addressed on the basis of the record in this matter, particularly as Sabre and others will further supplement that record. Cross examination, and the intricate procedures that inevitably would attach,

would add nothing but delay. Moreover, grant of the petition would create an unfortunate precedent, legally and logically inconsistent with several decades of judicial and departmental decisions.

Orbitz is not aware of any notice-and-comment rulemaking proceeding where the Department, or the CAB before it, allowed an oral evidentiary hearing. In fact, the Department has not held an oral evidentiary hearing on any aviation economic issue (other than hearings required by statute, such as for complaints against airport rates and charges) since 1993.[1]

Introduction

Sabre makes a number of points which are clearly correct: that a final rule must be supported by facts in the record; that the Department must give notice in the rulemaking of studies, facts, or data it is relying on in making its proposals, so that comments can address those issues; that facts supporting the final rule need to be reasonably current; and that oral evidentiary hearings are one of the options available to the Department in meeting its rulemaking responsibilities.

It is when Sabre argues that an oral evidentiary hearing is required or that it is the best, or even the only, tool available to the Department to meet its rulemaking responsibilities that it skates onto thin ice. The Department normally relies on notice-and-comment procedures to resolve issues of fact, law, and public policy of general applicability. There is nothing about this rulemaking that would somehow require the

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[1] The Department held an oral evidentiary hearing in the ATX Fitness Investigation in 1993. The Department last held a carrier selection hearing in 1992 in the U.S.-Brazil All-Cargo Service Case. Since that time, initial certification and carrier selection has been handled exclusively by show cause procedures.

Department to use an oral evidentiary hearing when it has never done so in any other rulemaking. And there is nothing that would suggest that an oral evidentiary hearing would clearly be the preferable way to deal with the issues Sabre raises. Indeed, from Sabre's perspective, the only clear virtue of an oral evidentiary hearing is that it would delay and burden this proceeding, thereby preserving, for as long as possible, the anti-competitive protection from normal market negotiations that Sabre enjoys under the current rules.

No public interest purpose would be served by an oral evidentiary hearing. Quite the contrary, the public would be denied for a longer period of time the advantages of greater competition in the CRS market.

Argument

I. NEITHER THE LAW NOR COMMON SENSE REQUIRE AN ORAL EVIDENTIARY HEARING IN THIS RULEMAKING.

Sabre's legal argument is premised on this construct: there is no practical difference between the arbitrary and capricious standard that applies to rulemaking and the substantial evidence standard that applies to a decision based on the record of an oral evidentiary hearing; an oral evidentiary hearing is the only way that disputed questions of material fact can be resolved; there are disputed issues of material fact in this matter; therefore an evidentiary hearing is required in this matter. Implicit in the argument is the assumption that cross examination is the only way to resolve factual disputes. Sabre cites roughly two dozen judicial and administrative cases as precedent for this construct.

Not one of the cases cited by Sabre stands for the proposition that an oral evidentiary hearing is required to resolve factual issues in a rulemaking proceeding, either in general or specifically in the context of Part 255. And none of those cases, save

one where there was a statutory hearing requirement, resulted in an oral evidentiary hearing. Equally important, the courts and the Department have recognized that cross examination on a public record is not the only, or the best, way to develop the factual basis for a regulatory decision.

A. The Law Does Not Require A Hearing.

1. The substantial evidence standard does not govern this rulemaking.

Section 4 of the Administrative Procedure Act (APA), 5 U.S.C. § 553, lays down the baseline notice and comment procedures for agency rulemaking. An adjudicatory hearing, *i.e.* a hearing with a closed record and the opportunity for cross examination, is not required unless such a requirement is imposed by another statute – and that is not the situation here. In reviewing an issued rule, Section 10 of the APA provides that the "arbitrary and capricious" standard governs. 5 U.S.C. § 706(a). The "substantial evidence" standard applies only to matters that are required to be determined by formal adjudication. 5 U.S.C. § 706(f). In general – and the specific distinction is discussed below – the arbitrary and capricious standard is "more lenient" than the substantial evidence standard. American Paper Institute v. American Electric Power Corp., 461 U.S. 402, 413 (1983).

What, then, of the observation in Ass'n of Data Processing Serv. Orgs. v. Board of Governors of the Fed. Res. Sys., 745 F.2d 677, 683 (D.C. Cir. 1984), that the tests are "one and the same"? According to Sabre, that stands for the proposition that rulemaking and oral evidentiary hearings are subject to the same standard of review. If that were what it meant, it would be at odds with the APA and decades of judicial precedent. Rather, then Judge Scalia noted that in a "hybrid" rulemaking proceeding that included an

on-the-record adjudication, as it did in the case before him, the distinction was academic, *i.e.*, "it is impossible to conceive of a 'nonarbitrary' factual judgment supported only by evidence that is not substantial in the APA sense." Id. at 684. He went on the explain the quite different standard that applies to informal agency action not subject to the APA's substantial evidence standard.

> [E]ven informal agency action (not governed by paragraph (E)) must be reviewed only on the basis of "the administrative record already in existence." But that is quite a different and less onerous requirement, meaning only that whether the administrator was arbitrary must be determined on the basis of what he had before him when he acted, and not on the basis of "some new record made initially in the reviewing court." That "administrative record" might well include crucial material that was neither shown to nor known by the private parties in the proceeding . . . It is true that, in informal rulemaking, at least the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation. That requirement, however, does not extend to all data. ...

Id. (citations omitted) (emphasis added).

Any agency decision subject to APA review needs to have a factual predicate. However, when the agency is engaged in notice-and-comment rulemaking, it has much broader latitude in developing those facts than when it is confined to the record of an oral evidentiary hearing.

2. The courts and the Department repeatedly have refused to turn rulemaking proceedings into adjudicatory proceedings.

Whether the Department has no alternative but to go beyond the notice-and-comment procedural requirements of Section 4 of the APA was resolved by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978). Overturning a decision of the D.C. Circuit that imposed additional hearing-type procedural requirements on an Atomic Energy Commission

rulemaking, the Court held that Section 4 of the APA "established the maximum procedural requirements which Congress was willing to have the courts impose upon agencies in conducting rulemaking proceedings." Id. at 524. While there may be exceptions,

> this much is absolutely clear. Absent constitutional constraints or extremely compelling circumstances, the administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.

Id. at 543 (citations omitted).[2]

Sabre's argument is a rehash of an argument first advanced by United nearly twenty years ago in opposition to the initial promulgation of Part 255. United argued that the CAB had made a factual determination that airline-owned CRS vendors had violated the antitrust laws and that the regulation was a form of antitrust remedy, findings it could not make without adjudication. The argument found a sympathetic ear with Judge Posner, but sympathy was not enough.

> But unfortunately for United Air Lines, the weight of authority, much of it in the Supreme Court and therefore beyond our power to reexamine, is overwhelming against forcing an administrative agency to hold an evidentiary hearing to resolve disputed issues of antitrust fact, though we can assume that there would be an exception for a fact that could not rationally be found without providing an opportunity for cross examination or some other trial-type procedural safeguard. Subject to this qualification, and provided that the agency issues what is genuinely a rule, which is to say a prospective regulation of general applicability, it is free

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[2] The Court's decision in Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915), is not to the contrary. That decision, issued nearly forty years before passage of the APA, held that there was no need for a public "hearing," and there was neither an expectation nor a request that it be an oral adjudicatory hearing, when a local taxing authority increased all assessments by 40%. The Court observed that if there were disparate treatment of individual taxpayers, due process would require that each be given an opportunity to be "heard" by the taxing authority, but again without an expectation that it would be a process that allowed cross examination of witnesses.

> to base the rule on the kind of findings normally made in an adjudicative proceeding, even if it conducts no evidentiary hearing.

United Air Lines, Inc. v. Civil Aeronautics Board, 766 F.2d 1107, 1119 (7th Cir. 1985).

United and American raised the argument again in 1983 in the context of information directives issued to the CRS vendors by the CAB. The CAB reiterated the reasons why an oral evidentiary hearing was not required.

> The need for oral evidentiary hearings, however, turns not only on the nature of the facts to be presented, but also on the purpose of any proceeding. If its purpose is limited to determining whether a particular event or events occurred, adjudication might be in order. Factfinding about past conduct is the purpose and end result of such a proceeding. In EDR-466, however, such fact finding is not the end result. Rather, we are attempting to determine the need to formulate rules of general applicability for prospective application. This goal is recognized as particularly well served by informal rulemaking proceedings. ... We are only trying to obtain a more complete factual basis before considering any further action on CRSs.

Order 83-10-74, at 3 (citations omitted).

Interestingly, of all the cases cited by Sabre, only one, Natural Resources Defense Council v. Herrington, 768 F.2d 1355 (D.C. Cir. 1985), actually resulted in a hearing requirement being imposed on a rulemaking proceeding. But there was a significant difference in Herrington, namely, a hearing was required by Section 336(a)(2) of the Energy Policy and Conservation Act. Id. at 1425-29.

The Department proceedings cited at page 10 of Sabre's petition all involved public meetings, not adjudicatory proceedings.[3] Neither of the cases considering antitrust

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[3] Public meetings are the type of non-adjudicatory "informal hearings" contemplated by Rule 5.29 of OST's Rules of Practice. 49 C.F.R. § 5.29. Federal Motor Vehicle Safety Standards (Side Impact Protection), 64 Fed. Reg. 14207 (Mar. 24, 1999) is a short notice of a "a public meeting to share the real world and test data that are available and explore technical issues relating to the assessment of potential benefits

(continued...)

immunity for the proposed American/British Airways alliance involved rulemaking. Moreover, the "panel" procedure adopted for the 1997 case specifically did not allow for cross examination and, in any event, was mooted by the eventual dismissal of the application (and never was held).

Finally, Sabre's reliance on the Data Quality Act is completely misplaced. Nothing in that law, or in its implementing regulations or guidelines, suggests that oral evidentiary hearings are a required, preferred or even desirable way to assure the quality of factual information disseminated to the public by an agency. The Data Quality Act is intended to provide persons with a way to comment on information before it is disseminated. "When the Department seeks public comment on a document and the information in it (e.g., a notice of proposed rulemaking ...) there is an existing

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(...continued)
and risks of side [inflatable restraint systems]." Id. at 14208. Centralization and Computerization of DOT Dockets, 60 Fed. Reg. 14050 (Mar. 24, 1995) is a short notice of a "public meeting" with the purpose "that users will benefit from an opportunity to hear a more detailed description of the new docket management system and to ask questions about it." Id. at 14052. Federal Motor Vehicle Safety Standard 206 (Door Locks and Door Retention Components), 60 Fed. Reg. 35889 (July 12, 1995) is a short notice of a "public meeting" with the purpose "to inform all interested parties about the current status of NHTSA's research on side door ejections and potential countermeasures for ejection reduction, and to solicit comments on the agency's findings." Id. at 35889. Motor Vehicle Content Labeling, 57 Fed. Reg. 54351 (Nov. 18, 1992) is a short notice of a "public meeting to receive oral comments concerning the new requirements for motor vehicle content labeling." Id. at 54351. Federal Motor Vehicle Safety Standards (Occupant Crash Protection), 48 Fed. Reg. 48622 (Oct. 19, 1983) is an NPRM on the protection of an automobile's front seat occupants in case of frontal, side-impact, and roll-over accidents. Included in the NPRM is an announcement of a series of "public meetings"; the DOT stated that "[w]ith the wide range of alternatives to be considered in this rulemaking proceeding, the Department seeks to narrow the issues through holding three public meetings. Data presented at the meetings will be made available for evaluation by other parties, subject to the agency regulation on treatment of confidential business information."

mechanism for responding to a request for correction. This mechanism is a final document that responds to public comments (e.g., the preamble to the final rule)." DOT Information Dissemination Quality Guidelines, at 24-25.

B. A Hearing Would Serve No Practical Purpose.

Missing from Sabre's petition is any discussion of exactly how cross examination of departmental staff and representatives of the parties would improve the record as compared to what reasonably could be expected to be developed in the notice-and-comment process. The Department is long since past the point where it believes that cross examination in a formal proceeding is necessary to resolve complex issues. It uses informal, non-adjudicatory procedures to handle everything from the allocation of routes to the grant of antitrust immunity. When parties requested a non-adjudicatory hearing for the most recent American/British Airways application for antitrust immunity, the Department denied the request noting that it has "routinely decided factual issues involving economic and policy questions in other cases of similar complexity without a formal hearing." Order 2001-12-5, at 3.

Judge Posner got to the bottom of this in his decision upholding the initial issuance of Part 255:

> More than authority is against United; though we are sympathetic to its position, we appreciate the arguments as well as the cases, against it. The biggest practical difference between adjudicative and rulemaking procedure is that cross-examination is available in the former but not – not generally anyway and not here – in the latter. <u>But cross-examination is not a terribly useful tool for extracting the truth about what are at bottom complex economic phenomena</u>.

<u>United v. C.A.B.</u>, <u>supra.</u>, 766 F.2d at 1121.

An adjudicatory hearing in this proceeding would be more than pointless. It would be detrimental to a thorough, efficient and timely resolution. Once a matter crosses the line into adjudication, a number of things happen. First, as noted in Ass'n of Data Processing, the concept of the "record" becomes much more restrictive. The ability of the agency to absorb information from all sources quickly becomes hampered by the need to insure that every bit of decisional information has been identified, marked and subjected to cross examination. Second, the procedures become much more complex and time-consuming. Sabre's thoughts at page 10 of its petition on how the hearing might be structured on a "topical" basis serve to underscore the breadth of the procedure it is asking the Department to undertake. Finally, and frankly, the use of the procedure suggested by Sabre might push what has been a straightforward notice-and-comment rulemaking proceeding into the murky area of a "hybrid" proceeding, subject to an uncertain standard of judicial review that invites, rather than discourages, challenges.

The Department has more than adequately laid out its basis and reasoning for each of the proposals it has tentatively made. In addition, on a great many issues, including many on which the Department has not made a specific proposal, it has specifically framed an issue and requested comments from any interested party. But most fundamentally, even if there were some study, fact, or data set on which the Department has relied, and which it has not yet added to the record, that situation can readily be remedied by the Department adding such material, if any exists, to the record. There

would be nothing about that situation, if it exists, that would require an oral evidentiary hearing to remedy.[4]

II. SABRE HAS NOT IDENTIFIED ANY MATERIAL FACTS THAT ONLY COULD BE RESOLVED IN AN ORAL EVIDENTIARY HEARING.

This is not the place to engage in an extended discussion of the facts, but Sabre's effort to identify material facts that require cross examination on a formal record begs the question, why? Addressing the "material facts" at pages 3-4 of Sabre's petition:

1. Whether any substantial evidence exists that non-airline-owned or marketed CRSs would have any market power in a relevant market, and would have the ability and incentive to engage in anticompetitive practices?

Sabre's own estimate is that it has a 48% share of CRS bookings in North America. NPRM, 67 Fed. Reg. at 69369. By any definition, that is market power in a relevant market held by a non-airline-owned CRS. The extent to which that gives it the ability and incentive to engage in anticompetitive practices is a judgment that an expert agency is best qualified to make – and there are ample facts in this record to support that judgment. If Sabre believes that the market share number is lower, or higher, it should submit that information to the Department. If Sabre believes that controlling half of the output in an industry does not constitute monopoly power, it should make that argument – and argument is what it would be. But one thing is clear. Cross examination of

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[4] This leads to Sabre's argument that the Department has not provided adequate notice of the studies it has relied upon. Petition at 13-14. It is difficult to conceive of a rulemaking where more notice was, or could have been, given. Moreover, to the extent that a study or other document is publicly available, it can be made part of the record either as part of comments or through official notice. Indeed, official notice could be taken of most such studies even in an oral evidentiary hearing. 14 C.F.R. § 302.24(g). If there are other studies that have not been made public and that are not part of the Department's internal deliberative process, and that is a significant exception, it would be useful to have them in the record.

numerous witnesses is not going to add anything to the record on this subject that could not be developed through the notice-and-comment procedures.

2. Whether the advent and growth of Internet travel distribution, direct-connect airline systems to travel agents, and airline divestiture of CRSs negate the need for and authority of the department to regulate non-airline-owned or marketed CRSs.

This is a policy question, albeit one on which it is likely that Sabre and Orbitz do not agree. However, it does not raise a material factual dispute best resolved through cross examination. The NPRM contains a fairly extensive discussion of the new retail environment. NPRM, 67 Fed. Reg. at 69372-80. If Sabre has other material facts it wants to add to that record, it can and should do so in its written comments.

3. Whether elimination of the Rule or any provisions thereof would lead to anticompetitive outcomes that could not be adequately addressed by existing antitrust and consumer protection laws enforced by the Department of Justice and Federal Trade Commission.

Putting aside the fact that the Department retains its section 411 jurisdiction with or without Part 255, this is another policy question.

4. Whether any current evidence supports the Department's preliminary "findings" that travel agents are locked into contracts with particular CRSs in a manner that is in any way anticompetitive?

The NPRM contains a detailed discussion of recent subscriber contract practices. NPRM, 67 Fed. Reg. at 69405-09. There is no dispute as to the nature and extent of those practices. Instead, Sabre disputes the conclusion that the cumulative effect of those practices is anticompetitive. Sabre can present other facts and/or argue for another conclusion without convening an oral evidentiary hearing.

5. Whether further vertical integration of the horizontally-concentrated airline industry into travel distribution would be likely to produce continued anticompetitive effects in relevant markets.

This is a legal and policy judgment. It also is exactly what Judge Posner had in mind when he spoke of "complex economic phenomena" for which "cross examination is not a terribly useful tool." United v. C.A.B., supra, 766 F.2d at 1121.

6. The extent to which travel agents who subscribe to CRSs exit those systems to make reservations directly in airline websites or in the airline-owned Orbitz website.

and

7. The extent to which airlines have succeeded in causing consumers and travel agents to bypass CRSs and make reservations directly with the airlines themselves.

The NPRM takes note of these market developments. NPRM, 67 Fed. Reg at 69378-80. It also notes that "certain systems are developing programs that would enable travel agents to sell webfares without leaving the system." Id. at 69380. To the extent that further details are material, they are available to Sabre and others, who should submit them for the record. One thing is certain. There is no need for an oral evidentiary hearing to develop these facts.

8. Whether their control of CRSs has allowed airlines that own or market CRSs to maintain or enlarge their monopoly or market power in general.

"In general," this is the type of broad, legal and policy inquiry that should be the subject of argument rather than sworn testimony under oath.

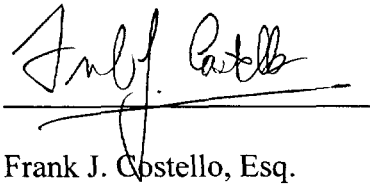
Conclusion

When you cut this proceeding to the core, there are few, if any, disputes about the facts. The retail distribution of air transportation is a transparent, public process in which there are no secrets. Sabre and others, including Orbitz, may argue about the legal and policy conclusions to be drawn from those facts, but those arguments do not create a need

for the extraordinary relief requested by Sabre in its petition. Indeed, if there were to be an oral evidentiary hearing, it would serve only to create further delay and confusion.

The petition should be denied.

Respectfully submitted,



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I hereby certify that on this 13th day of January 2003, a copy of the foregoing Answer of Orbitz, L.L.C. was served by first class mail, postage prepaid, or by hand, on the following.

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